No. 89-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HARRIET PAULEY,
SURVIVOR OF JOHN C. PAULEY,
Petitioner,

v.

BETHENERGY MINES INC., AND DIRECTOR
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT, BETHENERGY MINES INC., IN OPPOSITION

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QUESTIONS PRESENTED

In *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988), this Court determined that the United States Department of Labor's black lung "interim presumption," 20 C.F.R. § 727.203(a) (1989), was invalid under 30 U.S.C. § 902(f)(2) to the extent that it denied access to the presumption of total disability or death due to coal workers' pneumoconiosis to miners with less than ten years of coal mine employment but who were, nevertheless, able to demonstrate through x-ray or biopsy evidence that they had the disease.

Left unresolved in that decision and now presented for resolution are the following issues:

1. Whether the rebuttal provisions of the United States Department of Labor's black lung "interim presumption," 20 C.F.R. § 727.203(b) (1989), are invalid under 30 U.S.C. § 902(f)(2) because they permit denial of a claim where the medical evidence proves that the miner does not or did not have coal workers' pneumoconiosis or is not disabled or did not die, in whole or in part, due to his coal mine employment.

2. Whether the rights of coal mine operators and their insurers under the Due Process Clause of the Fifth Amendment of the Constitution of the United States are violated by an interpretation of 30 U.S.C. § 902(f)(2) of the Black Lung Benefits Act which precludes those operators from defending black lung claims by proving that the miner did not or does not have coal workers' pneumoconiosis or that the presumed disability or death did not result in whole or in part from coal mine employment.

LIST OF PARTIES AND RULE 29.1 STATEMENT

John C. Pauley ("Pauley") is a claimant for benefits under the Black Lung Benefits Act. While this matter was pending in the Benefits Review Board, United States Department of Labor ("BRB"), John Pauley died and is survived by his widow, Harriet Pauley. John Pauley was the respondent below, and his widow, Harriet Pauley, is now petitioner. On May 29, 1990, the Director, Office of Workers' Compensation Programs, filed with the BRB an unopposed Motion to Substitute Harriet Pauley, Nunc Pro Tunc, for her Deceased Husband, John Pauley.

Petitioner below and now respondent, BethEnergy Mines Inc., formerly Bethlehem Mines Corporation, is a wholly owned subsidiary of the Bethlehem Steel Corporation. The Director, Office of Workers' Compensation Programs, is the administrator of the black lung program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

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BethEnergy Mines Inc. opposes the pending petition because the disability of John Pauley did not arise in whole or in part out of coal mine employment. The denial of benefits under the Black Lung Benefits Act as ordered by the Third Circuit is correct. The United States Courts of Appeals for the Fourth and Seventh Circuits have determined that section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), prohibits employers from defending black lung benefits claims by proving that a miner does not or did not have coal workers' pneumoconiosis or that his disability or death did not result in whole or in part from coal mine

employment. *Peabody Coal Co. v. Hubert Taylor*, No. 89-1696; *Clinchfield Coal Co. v. John Taylor*, No. 89- ; *Consolidation Coal Co. v. Dayton*, No. 89- . BethEnergy respectfully suggests that a resolution of these conflicts by this Court is desirable and appropriate and that a consolidation of this case with the currently pending petitions for certiorari in Nos. 89-1696, 89- , and 89- is most likely to assure a final and complete resolution of the controversy presented. BethEnergy requests that this Petition for Writ of Certiorari be granted to confirm as correct the decision below.

STATEMENT OF THE CASE

A. INTRODUCTION

This case addresses the question left unresolved in *Pittston Coal Group*, 109 S. Ct. 414 (1988). The question is whether 30 U.S.C. § 902(f)(2) precludes coal mine operators from prevailing in non-meritorious Federal black lung claims by proof that the miner does not or did not have coal workers' pneumoconiosis or that his disability or death did not arise in whole or in part out of coal mine employment.

The Third Circuit held that no such interpretation of section 402(f)(2) of the Act is permissible and that no regulatory construction could require the payment of benefits to one who is statutorily barred therefrom. The Third Circuit's resolution of this issue, now under attack by this petition, is clearly correct.

B. STATUTORY BACKGROUND

The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988) (the "Act"), establishes a federal program to provide benefits to coal miners and their families on account of total disability or death due to coal mine employment related pneumoconiosis ("black lung" disease). 30 U.S.C. § 901(a). The program is divided into two parts. Claims filed from January 1, 1970 to June 30, 1973 are called "Part B" claims.

Part B claims were filed with and adjudicated by the Social Security Administration ("SSA"). Benefits awarded are paid by the U.S. Treasury. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 8 (1976).

Claims filed after December 31, 1973,[1] are filed under an approved state workers' compensation law, 30 U.S.C. § 931,[2] or if no law has been approved in the miner's state, with the U.S. Department of Labor ("DOL" or "Labor"). Claims filed with DOL are called "Part C" claims.[3] Benefits awarded in a Part C claim are paid directly by a mine owner or its insurer, 30 U.S.C. §§ 923(c), 933, or by a coal industry financed fund administered by DOL, *id.* § 934.[4]

In all segments of the program, benefit entitlements are determined in accordance with agency regulations setting forth eligibility criteria, medical standards and rules of proof. In general, there are three elements of entitlement: (1) the miner must have coal mine employment related pneumoconiosis, (2) the miner must be totally disabled or deceased, and (3) the total disability or death must be attributable to pneumoconiosis. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 141 (1987).

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[1] Claims filed between July 1, 1973 and December 31, 1973 were filed with SSA but adjudicated by DOL. They became Part C claims on January 1, 1974. 30 U.S.C. § 925.

[2] No state's law has been approved.

[3] Part B claims are adjudicated in accordance with procedures contained in the Social Security Act, 42 U.S.C. §§ 404-408, *incorporated by reference into* 30 U.S.C. § 923(b). Part C claims are adjudicated in accordance with the adversarial litigation procedures contained in the Longshore Act, 33 U.S.C. §§ 919, 921, *incorporated by reference into* 30 U.S.C. § 932(a). The on-the-record hearing provisions of the Administrative Procedure Act ("APA") apply in Part C claims, 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d).

[4] The Black Lung Disability Trust Fund is financed by a producer's tax on coal, 26 U.S.C. §§ 4121, 9501. The Fund is liable for claims if the miner last worked prior to January 1, 1970, or if no financially responsible mine owner or carrier can be found, 30 U.S.C. §§ 932(c), 934(a).

Originally, only the Secretary of Health Education and Welfare ("HEW") had authority to write eligibility regulations. 30 U.S.C. §§ 921(a), 932(b). In 1972, HEW published two sets of regulations. HEW's permanent regulations applied in both SSA and DOL claims. 20 C.F.R. §§ 410.401-410.476 (1989). A second set of "interim" standards applied only in SSA claims. *Id.* § 410.490. In 1978, Congress authorized DOL to write its own eligibility rules. 30 U.S.C. § 902(f)(1), and also mandated a review of all pending and previously denied claims. *id.* 945. Claims reviewed by DOL and a group of newly filed claims were to be considered under criteria that "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." *Id.* § 902(f)(2). DOL then promulgated interim regulations to comply with section 902(f)(2). *see* 20 C.F.R. § 727.203, and permanent regulations. see id. Part 718.

The SSA and DOL interim regulations are similar, but not identical. Both regulations erect rebuttable presumptions of entitlement. In both, the claimant proves predicate facts, eligibility is presumed, and ultimate facts are decided in the rebuttal inquiry. The employer bears the burden of persuasion in the rebuttal phase. *See, e.g., Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). The SSA rule may be invoked if the claimant establishes pneumoconiosis by x-ray, biopsy or autopsy evidence, or if the miner meets published values on pulmonary function tests. 20 C.F.R. § 410.490(b). Labor's rule follows this same format, but adds three additional bases for invocation (arterial blood gas tests, medical opinion evidence, and lay evidence in certain survivor's claims). *Id.* § 727.203(a). Labor's rule required at least ten years of coal mine employment for invocation by any method, while SSA's allowed a shorter term miner to invoke by x-ray, autopsy or biopsy evidence if additional evidence connected abnormal findings to coal dust exposure. *See Pittston Coal Group*, 109 S. Ct. at 418-19.

SSA's rule states that the presumption may be rebutted by evidence showing that the miner is still working or is able to work. The SSA rebuttal rule also cross-references certain provisions in the SSA permanent regulations. 20 C.F.R. § 410.490(c)(1), (2). SSA's rule makes no statement limiting the sort of evidence that may prove rebuttal facts. The Labor rebuttal rule generally follows section 410.490(c), but adds several provisions to it. First, the Labor rule states that all relevant medical evidence shall be considered. *Id.* § 727.203(b). The Labor rule also provides that rebuttal may be established by proof showing that (1) the miner's disability or death did not arise in whole or in part out of coal mine employment, or (2) that the miner did not or does not have pneumoconiosis. *Id.* § 727.203(b)(3), (4).[5]

C. BACKGROUND OF THIS LITIGATION

John Pauley worked as a miner for thirty years. He has early stage, simple coal workers' pneumoconiosis. On April 21, 1978, he filed a claim for benefits under the Act. (App. 3-4.) His case was tried before an administrative law judge ("ALJ"). DOL's interim presumption applied to Pauley's claim and was invoked by x-ray proof of pneumoconiosis. 20 C.F.R. § 727.203(a)(1). (App. 35-36.) After review of all pertinent evidence, however, the ALJ concluded that the presumption was rebutted under 20 C.F.R. § 727.203(b)(3) by proof that Pauley's disability did not arise in whole or in part out of coal mine employment. (App. 37-38.)[6]

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[5] Benefits are provided by the Act on account of total disability *or* death due to pneumoconiosis. 30 U.S.C. § 901(a). Labor's rule specifically accommodates rebuttal in a claim filed by a survivor of a miner. SSA's rule does not specifically do so, but SSA did not interpret its rules to preclude rebuttal in a case filed on behalf of a deceased miner. *See Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975).

[6] These findings have never been challenged. (App. 5.)

The ALJ then considered the claim under SSA's rule and found invocation based upon Pauley's admitted pneumoconiosis. He further determined that rebuttal was not available because Pauley was totally disabled due to conditions that had nothing to do with his coal mine employment; namely, arthritis and a residual hemiparesis. (App. 39.) The ALJ awarded benefits; determining that the fact that Pauley's total disability had nothing to do with his coal mine employment was irrelevant under SSA's rule. (App. 40.)[7] The BRB affirmed. (App. 21-22.)

On appeal, the Third Circuit reversed. (App. 19.) The court was troubled by the fact that Pauley's entitlement depended upon which presumption was used. The court concluded that the statute controlled and benefits were not available to Pauley because the Act provided benefits only to miners totally disabled, at least in part, by pneumoconiosis arising out of coal mine employment. App. 12 citing 30 U.S.C. § 901(a); *Mullins Coal Co.*, 484 U.S. at 141. The court held that disability causation rebuttal is implicit both under SSA's and DOL's regulations and the Act. (App. 14-19.)

Predominant in the court's reasoning are two inexorable concerns: (1) " . . . no set of regulations under it [the Black Lung Benefits Act] may provide that a claimant who is statutorily barred from recovery may nevertheless recover" and (2) " . . . the only way in which we [the Court] can affirm the Benefits Review Board [the award] is to hold that even though BethEnergy should, on the law and facts, have prevailed under the Benefits Act, by reason of the presumptions and limitations on rebuttal it must be responsible for benefits. We

[7] The administrative law judge relied on *Sulyma v. Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987), for the proposition that "disability causation" was not a proper rebuttal inquiry under SSA's rule but, such an interpretation was specifically rejected by the decision's author, Circuit Judge Morton I. Greenberg. (App. 18-19.)

decline to reach such an *unjust result*." (App. 13-14; emphasis added.)

ARGUMENT

Both the Fourth and Seventh Circuits have decided issues similar to those presented here, but have required payment of federal black lung benefits to miners who do not have black lung disease or whose disability or death did not arise in whole or in part out of coal mine employment and have deprived operators of due process by precluding consideration of determinative medical evidence. The decision of the Third Circuit is correct and properly precludes the payment of benefits to a miner under those circumstances and requires that employers receive a full and fair hearing. A conflict among the circuits exists.

A. THE CIRCUITS ARE IN CONFLICT

The Third Circuit holds that absent an irrebuttable presumption,[8] coal mine operators are free to defend black lung

[8] The petitioner would have this Court interpret SSA's rule as an irrebuttable presumption and declare that Congress in section 902(f)(2) of the Act requires such an interpretation. *See* Petition for Certiorari, Reasons for Granting the Petition (B) (1), (2), at 18-22. The Third Circuit rejected this proposal:

> We point out that when Congress wants to make a presumption irrebuttable so as to establish entitlement it knows how to do so. An irrebuttable presumption of total disability arises under 30 U.S.C. § 921(c)(3) if the evidence shows that the miner has a complicated case of coal miner's pneumoconiosis as defined in the subsection. In the event a miner may receive benefits even if there is other evidence that the miner can do his usual coal mine work or other comparable and gainful work. . . . There is, however, no indication that Congress had any intention to make the presumption invoked here on behalf of Pauley paramount over a showing by BethEnergy that Pauley did not qualify for benefits under the Benefits Act. We also observe that our result eliminates possible due process problems raised by the Director.

(App. 13.)

claims by demonstrating that the miner's death or disability did not arise in whole or in part out of coal mine employment. (App. 12-13.)

Prior to this decision, the Sixth Circuit held that regardless of whether SSA's rule is applied to a Part C claim for the purposes of invocation, rebuttal is controlled by Labor's rule. *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 201, 202 (6th Cir. 1987). The Seventh Circuit came to a contrary conclusion in *Hubert Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *reh'g denied*, (7th Cir. Feb. 1, 1990). It determined that Labor's rule violated section 902(f)(2) because it permitted the consideration of medical evidence on rebuttal.

The Fourth Circuit then struck down Labor's rules permitting rebuttal on the grounds that the miner did not have black lung disease or related disability. *John Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), *reh'g denied*, No. 87-3852 (4th Cir. Apr. 20, 1990); *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), *reh'g denied*, No. 89-3203 (4th Cir. Apr. 20, 1990). The Fourth Circuit held that SSA's rule did not expressly permit rebuttal by these methods. Accordingly, Labor's counterpart was more restrictive and thus violated 30 U.S.C. § 902(f)(2).[9] *John Taylor*, 895 F.2d at 182-83.

The dimensions of the conflict are adequately described in the Petition for Writ of Certiorari at 17-18, and the divergent views of the courts of appeals should be resolved in their entirety by this Court.

[9] Chief Judge Sam J. Ervin, III, dissented, noting constitutional and statutory problems with the result. 895 F.2d at 184 ("To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.").

B. THE THIRD CIRCUIT'S DECISION PROPERLY DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW

The court below in considering whether Labor's rebuttal provisions violate section 902(f)(2), premised its inquiry on the fundamental and statutorily expressed purpose of the Act: namely,

> to provide benefits . . . to coal miners who are totally disabled due to *pneumoconiosis* and to the surviving dependents of miners whose death was due to such disease. . . .

30 U.S.C. § 901(a).

With this in mind, the court defined its burden as follows:

> The only way in which we can affirm the Benefits Review Board is to hold that even though BethEnergy should, on the law and facts have prevailed under the benefits act, by reason of the presumptions and limitations on rebuttal, it must be responsible for benefits. We decline to reach such an unjust result.

(App. 13.) Not only is the court below's analysis correct, it is inexorable.[10]

[10] The legislative history of section 902(f)(2) which petitioner accuses the Third Circuit of ignoring also compels this result:

> The conferees intend that the Secretary of Labor shall promulgate regulations for the determination of total disability or death due to pneumoconiosis. With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.

(footnote continues)

1. The Plain Wording Of The Rebuttal Provisions Of The SSA's Rule Specifically Permits Disability Causation Rebuttal

The rebuttal provisions of the SSA rule are codified at 20 C.F.R. § 410.490(c) and provide as follows:

> (c) Rebuttal of presumption. The presumption in paragraph (b) of this section may be rebutted if:
>
> (1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see section 410.412(a)(1)), or
>
> (2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see section 410.412(a)(1)).

Both subdivisions of the section cross reference 20 C.F.R. § 410.412(a)(1). All of Part 410 is qualified by this definition of total disability which relates exclusively to the circumstance where the claimant is "disabled due to pneumoconiosis." Pneumoconiosis is earlier defined as "[a] chronic dust disease of the lung *arising out of employment in the Nation's coal mines* . . . ." 20 C.F.R. § 410.401(b)(1) (emphasis added).

Accordingly, rebuttal pursuant to section 410.490(c)(2) is accomplished when the evidence proves that the claimant is not precluded from performing his usual coal mine work or comparable and gainful work by a chronic dust disease of the lung arising out of employment in the Nation's coal mines. Having been found to have *no* disability arising in whole or in part from his coal mine employment, the claim of Pauley is rebutted under section 410.490(c)(2) as a matter of law. This interpretation is perfectly consistent with the statutory definition of compensable disability under section 902(f)(1)(A) of the Act:

> a miner shall be considered totally disabled when *pneumoconiosis* prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged . . . .

30 U.S.C. § 902(f)(1)(A).

As acknowledged by the Third Circuit, the Director is in complete accord:

> The Director further contends that in any event even under 20 C.F.R. § 410.490 the party opposing entitlement may produce evidence to establish that the disability did not arise out of coal mine employment. He asserts that a contrary ruling would violate Congressional intent, upset the statutory scheme and be inimical to the employer's due process rights.

(App. 11.) The court below was the only court to conduct an analysis predicated upon the statutory requirement of section 932(c) that benefits are to be paid by an operator, only because of death or disability due to pneumoconiosis which arose at least in part out of coal mine employment. 30 § U.S.C. 932(c). The court concluded that to interpret

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(footnote continued)

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 864, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 308, 309. *See Youghiogheny and Ohio Coal Co.*, 866 F.2d at 202.

It is certainly puzzling how petitioner could overlook the precise requirement of considering all relevant medical evidence in determining these claims when they submit that there is nothing in the history "even suggesting" this appropriate resolution. *See* Petition for Writ of Certiorari, Page 23, n.13.

20 C.F.R. § 410.490(c) differently would mean that a miner "both could and could not recover benefits under the Act, depending upon whether his claim was considered under Health, Education and Welfare or Labor regulations. We find this to be a disquieting result . . . ." (App. 12.) Petitioner offers an interpretation of SSA's rebuttal which would achieve a disquieting result in total disregard of the purpose of the Act. *Mullins Coal Co.*, 484 U.S. at 141. Even if the petitioner's analysis were plausible, which it is not, considering the Act's purpose, it is the Director's interpretation and not that of the claimant to which deference may be accorded. *Id.* at 159.

Petitioner argues that all of the courts of appeals construing Labor's rebuttal provisions, section 727.203(b)(2), which is essentially identical to section 410.490(c)(2), determined that it did not include a disability causation test. Petition for Writ of Certiorari at 20. This is true. Equally true, however, is that it did so because disability causation was precisely addressed in section 727.203(b)(3). *Oravitz v. Director, Office of Workers' Compensation Programs*, 843 F.2d 738, 740 (3d Cir. 1988) (stating that (b)(3) assumes total disability and limits rebuttal to those instances where the disability was caused by some other disease); *Roberts v. Benefits Review Bd.*, 822 F.2d 738, 740 (3d Cir. 1987) (stating that causation comes into play only with respect to (b)(3)); *Sykes v. Itmann Coal Co.*, 812 F.2d 890, 894 (4th Cir. 1987) (stating that causation is addressed in section 727.203(b)(3)); *Wetherill v. Director, Office of Workers' Compensation Programs*, 812 F.2d 376, 380 (7th Cir. 1987) (finding no need to resolve the question of the scope of (b)(2) rebuttal because rebuttal had been accomplished here under (b)(3)). Accordingly, petitioner's argument has no merit.

The only court to conduct an appropriate analysis of rebuttal under SSA's rule is the court below. This analysis achieved a result that is consistent with legislative history, the

express purpose of the Act, and the Director's interpretation of the regulations and is accordingly correct.[11]

2. The Rebuttal Provisions Of Labor's Rule Are Consistent With Section 902(f)(2) Of The Act

The Pauley court first determined that there was nothing contained in *Pittston Coal Group* predicting the resolution of Pauley. (App. 16.) The court commented:

> We think that if Congress had intended "criteria" under 30 U.S.C. § 902(f)(2) to include rebuttal criteria or criteria relating to matters other than those dealing with "total disability" it would have said so directly rather than dealing with the matter diffidently in the section.

(App. 17.) From this petitioner illogically submits that because the Act requires that pneumoconiosis be the condition which causes disability, the Act at section 902(f)(2) precludes a rebuttal inquiry into disability causation. *See* Petition for Writ of Certiorari at 22, 23.[12]

Whatever 30 U.S.C. § 902 means or does not mean, it cannot be read, as petitioner demands, to require the payment of benefits to miners who do not have pneumoconiosis or whose disability does not arise in whole or in part out of coal mine employment. This is the interpretation petitioner acknowledges is essential to the successful prosecution of her

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[11] It is noted that co-counsel for Pauley also represented claimants Charlie Broyles and Lisa Colley in *Pittston Coal Group* and there informed this Court that DOL's rebuttal rules were valid in all respects on the merits. Brief for Respondents Charlie Broyles and Lisa Kay Colley at 18-19 n.20 (Nos. 87-821, 87-827 and 87-1095 consolidated); *see also* Official Transcript, Proceedings Before the Supreme Court of the United States, *Pittston Coal Group* at 31-34 (U.S. Oct. 3, 1988).

[12] Petitioner's argument at this point directly contradicts her argument regarding appropriate consideration under SSA's rebuttal rule. *See* Petition for Writ of Certiorari at 18, 19. Here, she argues for the *inclusion* of pneumoconiosis in the definition of disability; there, her argument requires *exclusion*.

claim. As is noted by the court below, to award benefits to the petitioner, it would have, "to hold that even though BethEnergy should, on the law and facts have prevailed under the benefits Act, by reasons of the presumptions and limitations on rebuttal, it must be responsible for benefits." (App. 13.) Petitioner's argument also disregards the legislative history which requires the consideration of all relevant medical evidence including the types of medical evidence that might demonstrate the absence of disease or disability in determining claims under 30 U.S.C. § 902(f)(2). H.R. Conf. Rep. No. 864, *supra*, n.10; 30 U.S.C. § 923(b).

The petitioner's challenge of the *Pauley* court's analysis is without merit. Disability causation is not precluded from consideration by section 902(f)(2); it is an essential consideration.

C. A SIGNIFICANT CONSTITUTIONAL QUESTION MAY BE PRESENTED

The court below acknowledged a potential deprivation of constitutional rights that could result from an interpretation of 30 U.S.C. § 902(f)(2) prohibiting a mine operator from prevailing in a case in which the miner did not have pneumoconiosis or any related disability. (App. 13.) A similar concern was expressed in this Court's first review of the interim presumption. *Mullins Coal Co.*, 484 U.S. at 158-59 & n.30 ("but if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits."); *see also id.* at 440 n.32 ("Lurking beneath the surface of this case is the constitutional concern that there must be 'some rational connection between the fact proved and the ultimate fact presumed.' " (citation omitted)).

The validity of evidentiary devices under the Due Process Clause of the Fifth Amendment of the Contitution of the United States depends "on the strength of the connection between the particular basic and elemental facts and on the degree to which the device curtails the fact finder's freedom to

access the evidence independently." *Id.* at 439 n.30 (quoting *County Court v. Allen*, 442 U.S. 140, 156 (1979)). If the disability causation inquiry is precluded by section 902(f)(2), a presumption of total disability or death due to pneumoconiosis is established by x-rays, ventilatory or blood gas tests meeting specified values, or other proof that the miner has or had severe lung disease. Yet, the employer is permitted to rebut only if the miner is working or able to work. On its face, such a presumption is illogical, but upon closer analysis, it is patently irrational. Chest x-rays are incapable of showing the cause of total disability or death. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 6-7 & n.2. Abnormalities shown on the x-ray are not necessarily related to coal dust exposure.[13] Blood gas and pulmonary function studies are non-diagnostic and any abnormalities they show may be due to a host of illnesses or personal characteristics of the patient.[14] The pulmonary function invocation values in the rules are normal for older persons. For a deceased miner, without disability causation rebuttal, there is no rebuttal.

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[13] Pendergrass, *et al.*, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972). Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

[14] The SSA presumption does not permit invocation by blood gas test results. SSA treats blood gas evidence in a separate and more restrictive way than does DOL. 20 C.F.R. Part 410, subpart D Appendix. Arterial blood gas test results cannot diagnose pneumoconiosis or related disability. Abnormal blood gas components may be due to a vast array of illnesses, environmental factors, or the personal habits of the patient. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 162, 176, 186-87, 376-78 (1986). The pulmonary function invocation values in both the DOL and SSA rules are "basically normal" values for retired miners and just below normal for younger miners. *See Pittston Coal Group*, 109 S. Ct. at 412; *id.* at 432-33 n.8 (Stevens, J. dissenting.) Truly abnormal pulmonary function tests may detect disability, but are not diagnostic of black lung disease. A. Miller, *supra* at 4-5.

If section 902(f)(2) requires employers to pay benefits to miners who do not have pneumoconiosis or whose disability does not arise in whole or in part out of coal mine employment, it creates a presumption which is purely arbitrary and forecloses all reasonable inquiry into the truth of the matter. It completely curtails the fact finder's ability to assess the evidence independently because it makes medical evidence, the only evidence that matters, incompetent as a matter of law. The connections between predicate and ultimate facts are also exceptionally weak. It is hard to see how this passes due process muster at any level of scrutiny.

On the facts and on the law, BethEnergy should prevail in the claim of John Pauley. (App. 13.) Interpreting the Act or its regulations to require BethEnergy to pay benefits to Pauley is without constitutional predicate.

CONCLUSION

The Third Circuit's resolution of the claim of John Pauley is correct and must be affirmed. Should this Court intervene to resolve the conflict among the circuit courts on the question of available rebuttal under 30 U.S.C. § 902(f)(2) of the Act, this Petition for Writ of Certiorari should be granted, and this case should be consolidated with the petitions pending in *Peabody Coal Co. v. Hubert Taylor*, No. 89-1696; *Clinchfield Coal Co. v. John Taylor*, No. 89- . and *Consolidation Coal Co. v. Dayton*, No. 89- . to assure a final and complete resolution of the controversy presented.

Respectfully submitted,

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